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SUPREME COURT, U.S.

NO. 83-5670

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

JOHN JOSEPH LEVASSEUR,

PETITIONER,

v.

COMMONWEALTH OF VIRGINIA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF VIRGINIA

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TO THE SUPREME COURT OF VIRGINIA

The petitioner, John Joseph LeVasseur, prays that a writ of certiorari be granted to review the judgment of the Supreme Court of Virginia entered on June 17, 1983.

OPINION BELOW

The Supreme Court of Virginia entered its Memorandum decision affirming the judgment of the Circuit Court for Prince William County, Virginia, on June 17, 1983. A copy of the opinion is attached as Appendix A.

The court denied petitioner's petition for rehearing on September 9, 1983. A copy of the order is attached as Appendix B.

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on June 17, 1983 affirming the petitioner's conviction in Circuit Court. Petitioner timely filed a Petition for Rehearing which was denied by the Supreme Court of Virginia on September 9, 1983. This court has jurisdiction under Title 28 United States Code, Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury ...;"

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

1. Whether a defendant in a criminal prosecution of capital murder is denied his constitutional right to a fair and impartial jury guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution where a venireman, who stated she could not consider the use of illegal drugs as part of the defense of voluntary intoxication, is not removed for cause.

2. Whether a defendant in a criminal prosecution of capital murder is denied his constitutional right to a fair and impartial jury guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution where a trial court refuses to allow the defendant to voir dire veniremen on their bias and prejudice towards the use of illegal drugs which was a necessary part of the defense of voluntary intoxication.

3. Whether a venireman may be removed for cause on the basis that he had a moral or philosophical problem with imposing the death penalty is in violation of the Sixth and Fourteenth Amendments and principals set forth in Witherspoon v. Illinois.

STATEMENT OF THE CASE

Petitioner was found guilty of capital murder and sentenced to death by a Prince William County, Virginia jury on September 2, 1982. The Circuit Court of Prince William County, Virginia entered its final judgment order on November 5, 1982 in accordance with that jury verdict. (Attached as Appendix C.) The petitioner appealed to the Supreme Court of Virginia on several grounds, including those set forth in this petition. The final judgment of the trial court was affirmed on June 17, 1983 by a majority of four Justices of the Virginia court. The remaining three Justices joined in a separate dissent. A petition for a rehearing was denied on September 9, 1983. The issues decided by Virginia's highest court, insofar as are pertinent to this petition, involved two areas of inquiry during the voir dire of veniremen at the trial of petitioner which commenced August 30, 1982.

Petitioner's primary defense to capital murder was that he was incapable of premeditation at the time of the offense due to voluntary intoxication of drugs and alcohol. The first area of inquiry was directly related to that defense. Questions designed to ferret out those veniremen who, due to their bias or prejudice toward the illegal use of drugs, were incapable of considering that use in support of the defense of voluntary intoxication. After argument by counsel, the trial court initially allowed the petitioner to examine potential jurors to determine if such a bias or prejudice existed. (Record pp 233-235).[1]

After preliminarily examining the jurors en banc, they were then sequestered and brought out in pairs for examination concerning the death penalty and illegal drugs. Defense counsel's questions to the first few groups of two are attached hereto as Appendix D. In each of those instances, the potential jurors indicated they could consider the use of drugs in connection with the voluntary intoxication defense.

However when veniremen Cornwell was examined by defense counsel and the trial court, she indicated that she could not consider such evidence. The trial court denied petitioner's motion to strike her for cause:

* * * * * * * * *

Mr. Zauzig: I would assume that both of you are opposed to drugs, the use of illegal drugs. Do you have any bias or prejudice that would make you unable to consider the usage by the defendant, of illegal drugs, as part of his defense?

Ms. Cornwell: Say that again.

Mr. Zauzig: Would you be able to -- would you be unable to consider the usage by the defendant of illegal drugs, as a part of his defense?

Ms. Cornwell: I think so.

The Court: You would be able to consider it or --

Ms. Cornwell: I would be against the use of the drugs.

The Court: That presumption is there for all law-abiding citizens. The fact that he might have used that -- the fact that it may develop that he had used illegal drugs, could you consider that as a part of his defense?

Ms. Cornwell: No.

Mr. Zauzig: Your Honor, I have a motion.

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1 All references to Record page refer to the appendix page in the record of the Supreme Court of Virginia.

The Court: Motion is denied.

Mr. Zauzig: Note my exception.

The Court: Exception duly noticed.

(Record pp 275 - 276)[2]

* * * * * * * * * * *

The Court then denied the petitioner the right to examine any further venireman on the grounds that "...what [the] question in the past has been getting at is, in effect, asking the jury to sanction what is an illegal act." (Record pp 279-281). As a result of this ruling, nine of the fourteen jurors who sat on the jury finding the petitioner guilty of capital murder, thereby rejecting the defense of voluntary intoxication (Record pp 327-328)[3], had not been examined to determine their bias in this area.

Petitioner argued in its' appeal brief to the Virginia Supreme Court that the denial of petitioner's ability to examine prejudice or bias toward illegal drugs where an accused advances a defense of voluntary intoxication denies that accused of his constitutional right to a fair and impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution (see Appellant's Brief pages 18 to 22). The majority of the Virginia Court rejected the argument holding that the questions were ambiguous and "...were not relevant to a determination of bias or prejudice. ... Rather, they were calculated to elicit a prospective juror's underlying attitude toward the use of illegal drugs generally." (Appendix A-9-14). Justice Stephenson, joined by Justices Cochran and Poff, wrote in his dissent that petitioner's voir dire "was extremely relevant in determining whether bias or prejudice existed, as it touched the only defense he advanced...", and citing Dennis v. United States, 339 US 162, 171-72 (1950), stated that the refusal by the trial court was a denial of the petitioner's right to an impartial jury. (Appendix A-31). Petitioner sought a rehearing on this issue from the majority of the court which was denied.

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2 Cornwell was removed by the Commonwealth of Virginia through the exercise of one of their preemptory strikes.

3 The issue of voluntary intoxication was submitted to the jury and an instruction given as to the elements of that defense. Record p 860.

The second area of inquiry on voir dire pertinent to this petition involved the voir dire examination of a juror's ability to consider imposing the death penalty should the facts and circumstances warrant it. During examination by the commonwealth's attorney, venireman Tostenson responded equivocally to questions regarding the death penalty:

* * * * * * * * *

Mr. Ebert: Mr. Tostenson, if under the law and the evidence of this case, as it develops, it develops that the death penalty is one of the alternatives available to you, could you consider voting for that alternative? Mr. Tostenson: I'm not sure.

Mr. Ebert: Well, you'll have to tell us one way or the other. I understand you're not sure, but are you saying that you don't know? Do you have any feeling as to whether or not you could consider that alternative?

The Court: May I ask him the second part of the question?

Mr. Ebert: Let me ask you the second part of the -- the next thing I was going to ask you — could you actually vote, as one of 12 jurors, for the death penalty, should the law and the evidence warrant the same?

Mr. Tostenson: For the death penalty?

Mr. Ebert: Yes.

Mr. Tostenson: I don't know if I could be party to that or not. There is some doubt in my mind.

(Record p 264 lines 3-22)[4]

The trial court thereafter asked the venireman whether he had a "moral or philosophical problem with imposing the death penalty." (Record pp 265-266). Defense counsel was denied the opportunity to question this venireman and objected to the removal for cause by the court on the grounds that the questioning did not meet the criteria set down by Witherspoon v Illinois, 391 US 510, 20LEd 2d 776, reh'g denied 393 US 898 (1968) (Record p 266).

The appeals court reasoned that "[w]hether a juror is thus 'irrevocably committed' [to vote against the imposition of the death penalty] is a mixed question of law and fact for determination by the trial court." (Appendix A - 16). It follows, the court held, that "...factors beyond the printed record of this response led the trial court to conclude...that the venireman's commitment against the death penalty was 'unmistakably clear...'," (Appendix A - 16). The court held that the voir dire as a whole was not erroneous.

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4 The entire portion of the record involving this voir dire examination is set forth in full in the appendix attached hereto (Appendix E).

REASONS FOR GRANTING WRIT OF CERTIORARI

1. THE DECISION OF THE VIRGINIA SUPREME COURT ADDRESSING VOIR DIRE OF DRUG USE IN SUPPORT OF A DEFENSE OF VOLUNTARY INTOXICATION, INVOLVES AN IMPORTANT SIXTH AMENDMENT QUESTION.

This court has previously held that the "[p]reservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." Dennis v. United States, 339 US 162, 171-72 (1950). This right emanates from the Sixth Amendment of the United States Constitution as applied to the States through the Fourteenth Amendment. The refusal to allow the petitioner to voir dire veniremen on possible bias or prejudice towards drug use, which was an essential element of his defense of voluntary intoxication, deprived the petitioner of his opportunity to exercise effective and intelligent preemptory strikes and strikes for cause. A preemptory challenge, like the challenge for cause, exists "...to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them and not otherwise." Swain v Alabama, 380 US 202, 13 LEd 2d 759, 772 (1965). As a result, nine jurors of the fourteen who sat on the jury were never examined as to what actual bias they may have harbored in this area.

The majority decision below is directly contrary to the principals of the Sixth Amendment and to this court's prior rulings. The underpinning of the Virginia high court's decision attempted to circumvent these principals by relying on the argument that the voir dire questions were abstract and ambiguous and that "they were not relevant to a determination of bias or prejudice" (Appendix A - 13). The record of the actual questions propounded prior to the trial court's ruling and the nature of the defense advanced by the petitioner belie this conclusion. As argued in the dissenting opinion "there is no doubt defendant's voir dire was extremely relevant in determining whether bias or prejudice existed as it touched upon the only defense he advanced." (Appendix A - 13)

Even should this court conclude that the Virginia Supreme Court's decision basically deferred to the trial court's discretion based upon the record; this court should not allow a precedent of a trial court's discretion transgressing principals long before set forth by this court. Indeed, this court, in reaching its' decision in Aldridge v United States, 283 US 308, 311 75LEd 1054, 1056, (1930), stated that, after looking at the facts of the case, it had no reason but to believe that the counsel at trial had attempted to ask questions relative to such prejudice as would disqualify a juror from rendering an impartial verdict. There can be no doubt that the principal stated there, to-wit; that "the exercise of this discretion, and the restriction upon inquiries at the request of counsel, were subject to the essential demands of fairness," supra at 310, still holds true today.

The impact of the Supreme Court of Virginia's opinion reaches further than the capital murder conviction of this petitioner. It encroaches upon the very foundation of a fair trial--an impartial jury. The schism created by the divided Virginia Court and the erroneous precedent set into motion by the majorities opinion, shall deny others accused of crimes in Virginia from effectively probing into veniremen's bias and prejudice on areas critical to their particular trial.

2. THE DECISION OF THE VIRGINIA SUPREME COURT ADDRESSING VOIR DIRE ON THE DEATH PENALTY IS IN CONFLICT WITH THE PRINCIPALS SET FORTH IN THIS COURT'S DECISION IN WITHERSPOON V ILLINOIS.

The trial court excluded a potential juror because he indicated that he supposed he would "have a moral or philosophical problem with imposing the death penalty, regardless of how severe the evidence might develop to be." (Record p 266). Petitioner objected and stated, as he does now, that to exclude on that basis is contrary to the principals set down in Witherspoon v Illinois, 391 US 510 (1968).

On appeal the Supreme Court of Virginia explained that:

> A prospective juror may be excluded for cause if his views on capital punishment "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Adams v Texas, 448 US 38, 45 (1980). We have interpreted Witherspoon to mean that a juror who is irrevocably committed to vote against the imposition of the death penalty may be excluded for cause.... Whether a juror is thus 'irrevocably

committed' is a mixed question of law and fact for determination by the trial court." (Appendix A - 15-16.)

The court went further to surmise that in order for the trial court to reach the result it did "[f]actors beyond the printed record of his response led the trial court to conclude:'it is my interpretation from his answers that he has that problem.'"

Witherspoon v Illinois, Supra (Id.), was unmistakably clear in delineating the permissible scope for excluding for cause jurors on basis of their inability to vote for the death penalty. The court specifically held "...that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." Supra p 522. The footnote to this holding expanded on this concept by stating that "the most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings." Id. Fn 21 And the potential juror must state unambiguously that he would automatically vote against the death penalty Id p.515, Fn 9, a factor not present in the instant case.

The Virginia Supreme Court's decision diverges from Witherspoon in two respects. First and foremost, the potential juror here was excluded for precisely the same constitutionally unpermissible basis as jurors in Witherspoon: a basis short of being irrevocably committed to vote against the death penalty regardless of the circumstances before the trial commences. A person who affirmatively answers that he has a philosophical or moral "problem" is equivalent to a person who affirmatively answers that he has a "conscientious or religious scruple" with the death penalty: they are both qualified to sit on a capital murder case unless they further state that they would automatically vote against the death penalty.

There are no doubt countless persons who would have a problem with the awesome responsibility of voting for a death sentence but would be able to consider it as an alternative and carry out their responsibility as a juror. As this court pointed out in Witherspoon "it is entirely possible, of course, that even a juror who believes that capital punishment should never be inflicted and who is irrevocably committed to its abolition could nevertheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and obey the law of the state." Id. p 515 Fn 7 See Boulden v Holeman, 394 US 478, 483-484, 22LEd 2d 433, (1969).

The Virginia court cited Adams v Texas, 448 US 38, 65LEd 581 (1980) as supporting the proposition that "a prospective juror may be excluded for cause if his views on capital punishment 'would prevent or substantially impair the performance of his instructions and his oath'". Opinion 15. However a reading of Adams v Texas indicates that the language referred to was mere dictum expounding a general proposition which case in preceding paragraphs established. Adams v Texas does not dilute principals set forth in Witherspoon. Nor does the record even show that the prospective juror here would be prevented or substantially impaired in performing his duties as a juror in accordance with the instructions and his oath.[5] Rather the record shows at best that the potential juror was no more than nervous, or was emotionally involved, or had an inability to deny or confirm that he would actually vote for death in the case before him.

Second, besides not being asked questions which would determine the veniremen's qualifications in this area; his answers were ambiguous at best. On the one instant where the juror was asked by the prosecutor if he could consider voting for the death penalty as an alternative, he indicated "I'm not sure." To the remaining questions asked by either the prosecutor or court[6] incorrectly asking whether he could actually

5 In fact the veniremen stated that he would have no problem obeying the mandate of the oath of a juror, regardless of the evidence and could give a fair and impartial trial. Appendix F - 4.

6 Petitioner's counsel was denied leave to propound any questions to this veniremen.

vote for the death penalty, or whether he had a moral or philosophical problem with imposing the death penalty, the juror did not give answers which could be characterized as unambiguous as required by Witherspoon. This is evident by the appeal court tacitly admitting that the record alone did not support the trial court's ruling and assuming that there must have been something, albeit not found in the appellate record, that made the trial court reach the conclusion it did. Not only does this opinion depart from Witherspoon, it has created a new criteria which would lift a plainly unconstitutional ruling to a constitutional level on the basis of conjecture by the appellate court.

The potential juror was struck when there was absolutely no evidence that he was unambiguously committed to vote against the death penalty. Should this decision be allowed to stand, a grave encroachment of the rights of an accused charged with a capital offense in Virginia will solidify into a precedent in clear contrast with the Sixth Amendment guarantee of an impartial jury and the interpretation of that guarantee by this court.

CONCLUSION

For the foregoing reasons, petitioner John Joseph LeVasseur, respectfully requests that a writ of certiorari issue to review the judgment of the Virginia Supreme Court of Appeals.

Respectfully submitted,

DATED: October 28, 1983

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Present: [illegible]

JOHN JOSEPH LeVASSEUR

-v- Record No. 822050

COMMONWEALTH OF VIRGINIA

OPINION BY JUSTICE CHARLES S. RUSSELL
June 17, 1983

FROM THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY
H. Selwyn Smith, Judge

In a bifurcated jury trial conducted pursuant to Code § 19.2-264.3 et seq., John Joseph LeVasseur was convicted of the wilful, deliberate, and premeditated killing of Pamela Benner in the commission of robbery while armed with a deadly weapon, Code § 18.2-31(d), and his punishment was fixed at death.[1] On November 5, 1982 after considering the probation officer's report, the trial court imposed the death sentence. The defendant's appeal has been consolidated with the automatic review of his death sentence and given priority on our docket.

The facts will be stated in the light most favorable to the Commonwealth. Pamela Benner was nineteen years old in February 1982. After leaving high school, she had worked at the Pentagon, but on February 25, 1982, was unemployed and living in her parents' home in Woodbridge. She was acquainted with the defendant, but was not particularly fond of him. It had been more than three months since she had last seen him. She stayed at home most days but, having an interest in popular music groups, she attended many performances at night. Frequently, she invited band members, followers, and girlfriends to her parents' home during the day. Mr. and Mrs. Benner were both employed. They became concerned about occasional items missing from the house and habitually locked their door to their bedroom to safeguard their belongings. Pamela's brother, Rich, also worked during the day and kept his bedroom door locked for the same reason.

About 5:40 p.m. on February 25, 1982, Pamela's parents

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[1] In a separate non-jury trial, the defendant was convicted of the robbery of Pamela Benner and sentenced to life imprisonment. That conviction is not before us in this appeal.

brother returned home from work together. The front door was open. There was a strong smell of 'ammonia, Clorox or something of this nature,' and the kitchen exhaust fan was running. The doors to both the parents' and Rick's bedrooms had been kicked in. The locks and many wood splinters were on the floor. There were bloodstains on the broken doors and pieces of hair and blood on the floor. Pamela's purse was in the middle of her bed, and some articles from it had been emptied onto the bed.

In a downstairs family room they found Pamela's body. Her ankles were bound together with masking tape and a cord from a stereo headset. An ice pick and a two-pronged carving fork were protruding from her back. She had three "penetrating wounds" beside the right eye, and over forty other wounds, abrasions, and lacerations covering her body. The back of her head was crushed by blows from a blunt instrument. There were some stab wounds which showed no hemorrhaging. In the medical examiner's opinion, this indicated that they had been inflicted after heartbeat had ceased. Some of the wounds to the hands were described as 'defensive,' evidently incurred while the victim tried to ward off additional blows. She was clad in a long green bathrobe. It and the body had been soaked in a liquid bleach, which discolored the fabric and burned the skin. A curtain rod lay on her body, and a fireplace poker lay on a blanket near her feet. Charred marks on the carpet indicated that an unsuccessful effort had been made to burn the body. A telephone jack receptacle was found on the floor near the victim's feet. A latent fingerprint was found on it which proved to be the defendant's.

The defendant's blood-spattered shoes and clothing were later found in a plastic bag in a trash 'dumpster' some distance from his home. Forensic laboratory tests identified the stains as having been made by the victim's blood. Various items stolen from the victim's family home the day of the murder were found in the bag with the clothing. Some of these items had been kept in the locked bedrooms which had been kicked open.

Gerald Frazier testified that he had known the defendant f

two years. At about 4:15 p.m. on February 25, 1981, the defendant came, with his wife, to the apartment where Frazier was visting, and asked "if I could give him an alibi, that he needed to say that he was with me from two to four o'clock . . . that day." The defendant was smiling and seemed normal. He showed no signs of being under the influence of drugs or alcohol. Frazier told him that he would be unable to provide an alibi because he had attended a job interview at 2:15 p.m. When he asked why an alibi was needed, the defendant said "he had killed somebody." He said it had been a girl named "Pam . . . . some big, fat slob . . . I went to rob her." Frazier testified that the defendant told him:

> A. He said that he came in through the back of the house. And he said that first he hit her in the back of the head with some object. I can't remember what the object was, but he hit her with it and she fell to the floor.
>
> And he said she pleaded with him to stop, to leave her alone. She even said that she loved him so that, you know, he would leave her.
>
> And he said, you know, the bitch wouldn't die and he kept hitting her. And then he said he got a two-pronged kitchen fork and stabbed her, and an ice pick, and stabbed her repeatedly with that.
>
> And then he said that he looked for money and all he could find was about two sixty-five in change, or something like that. Then he said that he couldn't stand to be in the house any longer.
>
> He tried to destroy the evidence by using a bleach or laundry detergent - - that's what he said - - to pour over her. To get rid of fingerprints and things like that. Then he said - -
>
> Q. Did you ask him anything about the effect of that bleach?
>
> A. No.
>
> Q. Go ahead.
>
> A. Well, he just said, you know, he thought it was like acid. You know, he thought it would remove the fingerprints and destroy the evidence or whatever.

The defendant then told Frazier that he had gone home, changed clothes, showered, and threw his clothing in a "dumpster" at the Bayview Apartments. Frazier told him to "go and turn himself in. And I didn't want to have any part to do with it. I wasn't going to give him an alibi or anything."

Later that evening the defendant called Frazier and told h

telephone close to a police radio scanner to which the defendant was listening. Frazier could hear the police radio transmissions discussing a "possible D.O.A." The defendant told Frazier he was thinking of going to Kentucky to stay with a relative.

The next day the defendant went with his attorneys to the Garfield substation and surrendered himself to the police. He stood by a police officer who was seeking the issuance of a murder warrant from a magistrate. When the officer stated that the Summers had reported a theft of about twenty dollars in cash from their home, the defendant, who had been given Miranda warnings interrupted and said, 'I only got three dollars.'

Later, while riding with an officer in a police car, the defendant said, "If I'd burned her, I wouldn't have to go through this . . . [expletive deleted]." The defendant later testified that he could not recall making this remark, but that he might have said it and would not deny it.

The defendant made no denial of the atrocious nature of the crime or of his responsibility for the killing. This was made clear to the jury in the opening statement of the defense. Defense counsel told the jury that the evidence would not show the defendant guilty of capital murder, but rather would show guilt of 'a lesser degree of murder.'

The defendant testified that he was living with his wife and child in his mother's home in February 1981. His father, with whom he was particularly close, had died the previous year. The defendant is Vietnamese, having been adopted by the LeVasseurs when he was two years old. He was unemployed at the time and felt guilty about living in his mother's home because he was not helping her with the family printing business. He said that he looked for jobs sporadically. He was depressed and attempted to relieve his depression by the heavy use of illegal drugs.

On February 25, 1981, he said his wife awoke him around 10:30 a.m., and asked him if he was going out to look for a job. He said he dressed and smoked 'from seven to ten bong hits' of marijuana, which was not unusual for him. He then went to two service stations which had advertised for help, but was turned down by both. He then went to a restaurant and consumed "two

beers' plus 'a hit of acid' (lysergic acid diethylamide, or LSD) on a piece of paper. He said he then felt "limp" and had impaired vision. He went to Pam Benner's house because it was [illegible] by and he wanted to get out of the car and either 'crash out or just talk about what's happening."

Pam, he testified, did not immediately answer the door. He looked in a basement window and saw her in the recreation room 'sitting and eating eggs, I think, watching T.V.' He attracted her attention, and she admitted him to the home. He said he "had a migraine headache, and . . . was feeling terrible . . . I felt like there was a brick inside my head." He said they discussed his work situation, his living arrangements, and the recent death of his father. Pam had formerly worked in the LeVasseurs' print shop and had a photo album containing a picture of his father. She showed this to him and 'was making snide remarks because we had it made or I really had it made as far as living under the same roof with my mother and getting free meals and working in the same place of employment.' Then, he testified, "I didn't take too kindly of it and I started getting upset and then the next thing, alls I remember was a flash of light went into my head and -- all I remember is seeing my father in Walter Reed - I mean Fort Belvoir Hospital."

He said he then heard a woman's screams, but the next thing he remembered seeing was Pam's body with 'two objects sticking out the back.' He said he had been sitting behind Pam, massaging her back, when the 'flash of light' occurred, and that he remembered none of the intervening events.

The defendant further testified that he 'went hysteric and panic,' ran up the stairs and kicked open two doors "to get out." He remembered the smell of bleach and the bloodstains on his shirt, pants, and hands. He saw the masking tape and "rope" around the victim's ankles.

The defendant said that he had no recollection of removing any objects from the house, but that while he was driving home he noticed that he had with him, lying on the passenger seat of the

car, a photo album, a calculator, two watches, 'and money lying all over the seat.' When he arrived home, he said he was feeling 'disgust [sic] and scared." His wife told him to take a shower while she put all of the items taken from the Benner home, together with the defendant's clothing, into a plastic bag. He testified that while in the shower, he saw a murder inside his head. 'It was me beating up on Pat Benner . . . with a poker.' He and his wife then drove to the Bayview Apartments where they disposed of the plastic bag in a "big, giant dumpster." They then went to a bank where his wife withdrew some money. "At the time we didn't know whether I was going to skip town or turn myself in."

The defendant largely corroborated Frazier's testimony. He admitted that he had gone to Frazier to ask him for an alibi and that he had disclosed the murder. He did not recall having referred to the victim as 'a fat slob," but said he would probably have said it 'to be macho at the time.' He admitted having said to Frazier that "the bitch wouldn't die." Asked to explain this remark, he said, 'Because - well, when I was in the house there was more than just stabs on her.' He remembered having called Frazier later and listening to reports of a "possible D.O.A." on the radio scanner.

Later that evening the defendant called another friend, Mike Hamilton, to 'come over and party with me - I've got some good pot.' Hamilton had other plans. The defendant then took 'about 15 to 20 bong hits and had about two or three glasses of Jack Daniels." The next day, accompanied by his counsel, he surrendered himself to the police.

The defendant denied going to the Benner house for the purpose of robbing Pamela. He did admit, however, that two weeks earlier he had discussed with Mike Hamilton the prospect of committing burglaries and specifically proposed a robbery of another woman for the purpose of raising money.

In rebuttal, the Commonwealth called three fellow inmates the Prince William County jail, with whom the defendant had, while in custody, discussed the case. All were convicted felons. Ray Jackson testified that the defendant told him that he had gone

Jan's house for sexual favors, that when she rebuffed him he had beaten her with a poker, and that he had gone upstairs to the kitchen, obtained a large fork, an ice pick, and a steak knife, stabbed her with them and then poured some kind of 'detergent' over her. He said that the defendant described taking watches, calculators, and money from the house, all of which he later hid in a garbage bag with his clothing.

Donald McKenna testified that the defendant told him a similar story as to his motive, that the defendant said the victim's skull "sounded like a coconut breaking when he was hitting her," with the poker, that the defendant said "the bitch wouldn't die," and that after obtaining the fork and ice pick, he lay down beside the body to ascertain the location of the heart in order to be sure to stab her fatally.

Louis Aris Mendy testified that the defendant told him that he had argued with Jan over money. The defendant gave him a similar account of the beating and stabbing, then said that he returned to the kitchen, got some "Clorox," and poured it over the body.

The defense was based entirely upon the contention that the defendant was so affected by the drugs and alcohol he had ingested that he was incapable of premeditation or deliberation at the time of the killing. He further argues that the evidence shows that the intent to commit robbery did not come into existence until after the killing, and that he was therefore guilty of no more than second-degree murder. The defendant filed fifty-six assignments of error, which he has reduced to eleven questions presented on appeal. We shall consider them seriatim.

A. Jury Selection.

1. Voir Dire Examination as to Jurors' Attitudes Toward the Death Penalty.

The defendant argues that subjecting veniremen to a test as to their ability to apply the death penalty, in a proper case, deprives him of a fair cross section of the community and provides him with a jury that is "guilt prone." He sought to introduce

statistical evidence to this effect, similar to that relied upon in Hovey v. Superior Court, 28 Cal.3d 1, 616 P.2d 1301 (1980).

We have specifically approved the examination of veniremen on voir dire, as to their willingness, or lack thereof, to impose capital punishment. Wave v. Commonwealth, 219 Va. 683, 251 S.E. 211, cert. denied, 442 U.S. 924 (1979), Turner v. Commonwealth, 221 Va. 813, 273 S.E.2d 36 (1980), cert. denied, 454 U.S. 1011 (1981). Moreover, we have expressly rejected the type of evidence adduced in Hovey. Justus v. Commonwealth, 222 Va. 667, 283 S.E.2d 905 (1981), cert. denied, 455 U.S. 983 (1982), and we continue to adhere to that position.

II. Change of Venue.

The defendant filed a motion for a change of venue which was argued six days before trial. In support thereof, he offered sixteen newspaper clippings and a privately-taken local opinion poll. The court received the newspaper clippings in evidence, but rejected the results of the opinion poll. No affidavits were offered in support of the motion. The court denied the motion, but stated that it might be renewed if voir dire questioning should reveal widespread prejudice against the defendant. The court also indicated its intention to question the veniremen directly with respect to pre-trial publicity and possible bias resulting therefrom.

At trial, thirty-three veniremen were subjected to voir dire questions, at first together and then in groups of two. Three were excused because of personal acquaintance with the defendant or the victim. Of the remaining thirty, only ten recalled any exposure to publicity concerning the case. None of them was aware of any bias against the defendant, none had formed an opinion as to his guilt, and all stated a willingness to lay aside whatever they had heard or read and to decide the case solely on the evidence and the court's instructions. Indeed, the defendant concedes on brief that "the record discloses no widespread prejudice during voir dire," but argues that this is of little significance since voir dire was limited and the judge's questions were "leading."

questioning on the subject of bias. The trial judge asked questions designed to elicit responses showing the effects of pre trial publicity, and there is no indication that appropriate foll up questions would have been prohibited, if any had been indicate In fact, none were requested.

It is presumed that a defendant can receive a fair trial in the locality where the offense occurred, and the burden is on the accused to overcome that presumption by clearly demonstrating wid spread prejudice against him. Coppola v. Commonwealth, 220 Va. 243, 248, 257 S.E.2d 797, 801 (1979), cert. denied, 444 U.S. 1103 (1980). The trial court's discretion in ruling upon such a motion will not be disturbed in the absence of a clear showing of abuse. Clanton v. Commonwealth, 223 Va. 41, 50, 286 S.E.2d 172, 177 (1982). No such showing was made here. The news articles tender ed to the court simply reported the facts, which are shocking in themselves. They were not inflammatory. They were numerous, but sheer volume of publicity is not alone sufficient to justify a change of venue. Linwood Earl Briley v. Commonwealth, 221 Va. 532, 538, 273 S.E.2d 48, 52 (1980), cert. denied, 451 U.S. 1031 (1981). The trial court's discretion was not abused.

III. Voir Dire Examination as to Jurors' Attitudes Toward the Use of Drugs.

After all prospective jurors had been subjected to voir dir questioning as a group, they were sequestered and groups of two were brought into the courtroom for further questioning. One of these pairs consisted of Anna V. Cornwell and Linda Curren. The court propounded questions to both concerning pre-trial publicity, the existence of any bias or prejudice, the formation of opinion as to guilt, willingness to base a verdict solely on the law and the evidence, and attitudes toward the death penalty. The Commonwealth Attorney asked two questions concerning their willingness to impose the death penalty if the law and evidence so warranted When defense counsel arose to question them, the following colloquy ensued:

The Court: Mr. Zauzig?

Mr. Zauzig: I would assume that both of you are opposed to drugs, the use of illegal drugs. Do you have any bias or prejudice that would make you unable to consider the usage by the defendant, of illegal drugs, as part of his defense?

Ms. Cornwell: Say that again.

Mr. Zauzig: Would you be able to -- would you be unable to consider the usage by the defendant of illegal drugs, as a part of his defense?

Ms. Cornwell: I think so.

The Court: You would be able to consider it or --

Ms. Cornwell: I would be against the use of the drugs.

The Court: That presumption is there for all law-abiding citizens.

The fact that he might have used that -- the fact that it may develop that he had used illegal drugs, could you consider that as a part of his defense?

Ms. Cornwell: No.

Mr. Zauzig: Your Honor, I have a motion.

The Court: Motion is denied.

Notwithstanding this ruling, the record discloses that Anna Cornwell was struck from the jury as a result of peremptory challenge by the Commonwealth, rather than by the defendant. The defendant argues that he had a constitutional right to twelve impartial jurors who would freely entertain his defense of voluntary intoxication, and erroneously argues on brief that he was forced to use one of his peremptory strikes to remove her, since she "harbored a bias and prejudice toward the use of [illegal] drugs, which was a fundamental issue in the trial."

Leaving aside the defendant's error in asserting that this ruling cost him a peremptory strike, his underlying argument is fallacious. Indeed, it is to be hoped that all responsible citizens are prejudiced against the use of illegal drugs. A challenge for cause based upon such a question would eliminate from the jury all except those who approve of crime. A proper question, which might have been framed to meet the defendant's concern, would have inquired whether the juror could follow the court's instruction

which would reduce the defendant's criminal responsibility if the jury found that he was so affected by voluntary intoxication as to be incapable of premeditation or deliberation. The questions, as asked, are equivocal: "Would you be able to -- would you be unable to . . . ." They were in fact clearly misunderstood by the juror: "I would be against the use of the drugs." Further, a question which asks whether the juror would be able to consider the use of illegal drugs "as a part of his defense" is so ambiguous as to render the answer meaningless. Does it ask whether the juror would consider drug intoxication a mitigating factor, or does it ask whether the juror would treat it as total justification or excuse for the crime, necessitating an acquittal? No principle of law would support the last premise. Because the question was improper, the motion to challenge the juror for cause was properly denied.

IV. Further Voir Dire Questions Concerning Attitudes Toward the Use of Illegal Drugs.

At a pretrial hearing, the court directed counsel to submit in writing their respective proposed voir dire questions. In response, the defendant submitted a list of fifty-eight questions, eight of which inquired elaborately into the attitudes of veniremen toward illegal drugs in general.

The court held that the proposed questions were argumentative and ambiguous. However, the court advised counsel that he would have an opportunity to rephrase them and that such an effort would be considered at the beginning of trial. The defendant made no objection to the ruling, but agreed to rephrase the questions.

No written rephrasing of the questions appears in the record. Counsel was, however, permitted to propound questions on this subject orally to the prospective jurors as they came before the court in groups of two. Each time the question was asked, its phraseology differed. The first time it was used, counsel asked: "Do any of the two of you, or would either of you be unable to consider evidence of the use of illegal drugs in support of defense to the crime of murder?" There was no response. With each suc-

cessive pair of veniremen, the question became more convoluted, but no more precise. Eventually, the Commonwealth objected. The court suggested a revision, which would meet the objection, but counsel, rather than adopting the suggestion, rephrased the question as quoted in the previous section, and propounded it to Anna Cornwell.

After the Cornwell colloquy, another pair of jurors was subjected to voir dire examination. When defense counsel arose to interrogate them, the court stated:

> Mr. Zaudig, the other question which you have asked in the past has been re-phrased. The Court has previously ruled on this question and how this should come forward. It did not come forward. What your question in the past has been getting at is, in effect, asking the jury to sanction what is an illegal act. For that reason, I'm denying you the right to ask that question as far as any further prospective jurors are concerned.

The defendant made no further effort to improve the question, but objected and challenged this ruling on appeal.

Code § 8.01-358, as amended in 1981, now makes the direct questioning of prospective jurors by counsel a matter of right. Cf. Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36 (1980), cert. denied, 451 U.S. 1011 (1981). It provides in pertinent part:

> The court and counsel for either party shall have the right to examine under oath any person who is called as a juror therein and shall have the right to ask such person or juror directly any relevant question to ascertain whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein. . . .

Code § 8.01-358 (emphasis added). While the 1981 amendment makes mandatory the formerly discretionary right of counsel to question the prospective jurors directly, it has no effect on the nature of the questions which may be asked. The questions propounded by counsel must be relevant, as always, and the trial court must, in its discretion, decide the issue of relevancy, subject to review for abuse. See Bassett v. Commonwealth, 222 Va. 844, 853, 284 S.E.2d 844, 850 (1981); Deal v. Nix & Son, Inc., 206 Va. 57, 63, 141 S.E.2d 683, 688 (1965); Slade v. Commonwealth, 155 Va. 1099, 156

S.E. 388 (1931). The test of relevancy is whether the questions relate to any of the four criteria set forth in the statute. If an answer to the question would necessarily disclose, or clearly lead to the disclosure of the statutory factors of relationship, interest, opinion, or prejudice, it must be permitted. Question which go beyond this standard are entirely within the trial court discretion. Davis v. Sykes, 201 Va. 952, 121 S.E.2d 513 (1961).

A party has no right, statutory or otherwise, to propound any question he wishes, or to extend voir dire questioning ad infinitum. The court must afford a party a full and fair opportunity to ascertain whether prospective jurors "stand indifferent in the cause," but the trial judge retains the discretion to determine when the parties have had sufficient opportunity to do s

Here, the defendant made no proffer of the questions he wo have asked of subsequent prospective jurors. On appellate revie we can only assume that they would have been similar to those pu to the series of veniremen culminating with Anna Cornwell. For the reasons stated in the preceding part of this opinion, the court did not abuse its discretion in excluding such questions. They were not relevant to a determination of bias or prejudice. Rather, they were calculated to elicit a prospective juror's und lying attitude toward the use of illegal drugs generally.[2] Such attitudes might well be interesting to counsel, but they have no relationship to the juror's ability to abide by the court's instructions, to find the facts impartially, and to apply the law to the facts conscientiously.

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[2] At the time of voir dire questioning, the veniremen had not been instructed in the law relating to the defense of voluntary intoxication. The questions gave them no legal framework by wh to fix the inquiry in the context of that defense. The veniremen might properly have been asked whether they objected so strongly to the use of illegal drugs that they would be unable to follow an instruction by the court which would reduce the defendant's criminal responsibility if the jury found from the evidence that was so affected by the voluntary ingestion of such drugs that he incapable of premeditation or deliberation, a requisite element of capital murder.

Without such a framework, the questions were abstract. A noted above, the veniremen could readily infer that they were b asked if they could acquit the defendant if they found that he using illegal drugs. There being no such principle of law, the only effect of the questions was to elicit the intensity of the veniremen's objections to criminal conduct.

Moreover, the record indicates that the trial court affords the defendant every reasonable opportunity to ask relevant questi which would be designed to elicit bias or prejudice on the part o prospective jurors. At least seven opportunities were given to counsel to rephrase the question, finally accompanied by a direct suggestion from the court, which was not followed. The questioning actually conducted by the court was sufficient to preserve th defendant's right to trial by a fair and impartial jury, and we find no abuse of discretion in the court's refusal to permit further voir dire questioning by the defendant on the subject of illegal drugs.

V. Voir Dire Questions as to a Juror's Ability to Impose the Death Penalty.

During the questioning of prospective jurors in groups of two, questions were put by the court to Rudolph Woltner and Edwar Tostenson. Mr. Woltner responded to the effect that if capital murder were proved, he would automatically vote to impose the deat penalty. Without awaiting a challenge, the court excused him for cause. The Commonwealth's Attorney then questioned Mr. Tostenson

> Mr. Ebert: Mr. Tostenson, if under the law and the evidence of this case, as it develops, it develops that the death penalty is one of the alternatives available to you, could you consider voting for that alternative?
>
> Mr. Tostenson: I'm not sure.
>
> Mr. Ebert: Well, you'll have to tell us one way or the other. I understand you're not sure, but are you saying that you don't know? Do you have any feeling as to whether or not you could consider that alternative?
>
> The Court: May I ask him the second part of the question?
>
> Mr. Ebert: Let me ask you the second part of the - - the next thing I was going to ask you - - could you actually vote, as one of 12 jurors, for the death penalty, should the law and the evidence warrant the same?
>
> Mr. Tostenson: For the death penalty?
>
> Mr. Ebert: Yes.
>
> Mr. Tostenson: I don't know if I could be party to that or not. There is some doubt in my mind.
>
> The Court: Excuse me, Mr. Ebert. I don't think there is any necessity in going any further and

causing this gentleman to agonize. Mr. Zauzig, do you insist upon questions to be asked?

Mr. Zauzig: Yes; I'd like to ask some questions, Your Honor, if I can.

The Court: All right; I'll permit you to ask questions.

Mr. Zauzig: Mr. - -

Mr. Ebert: Your Honor, at this point, I would object. It seems to me that from his answers, he does have at least a moral or philosophical problem with the potential of imposing the death sentence and I don't think he should be questioned further or permit the defendant - -

The Court: Let me ask that question; excuse me, Mr. Zauzig. Do you have a moral or philosophical problem with imposing the death penalty, regardless of how severe the facts and circumstances - - the evidence may be - - not facts and circumstances, but the evidence?

Mr. Tostenson: Would you please repeat that question?

The Court: Do you have a moral or philosophical problem with imposing the death penalty, regardless of how severe the evidence might develop to be?

Mr. Tostenson: I suppose I would.

The Court: Under the circumstances, Mr. Zauzig, I see no reason to go any further.

The defendant objected to this ruling, citing Witherspoon v. Illinois, 391 U.S. 510, reh'g denied, 393 U.S. 898 (1968), and further objected on the ground that he was not given an opportunity to "rehabilitate" Mr. Tostenson by further questioning. Defense counsel pointed out that, under Witherspoon, the mere fact that a juror had religious or moral objection to the death penalty would not alone warrant his exclusion; he could be excluded for cause, in effect, only if he would refuse under any circumstances to consider it. The court responded: "Mr. Zauzig, the Court has ruled on that, and it is my interpretation from his answers that he has that problem."

A prospective juror may be excluded for cause if his views on capital punishment "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Adams v. Texas, 448 U.S. 38, 45 (1980). We have interpreted Witherspoon to mean that a juror who is ir-

revocably committed to vote against the imposition of the death penalty may be excluded for cause. Coppola v. Commonwealth, 220 Va. 243, 250, 257 S.E.2d 797, 802 (1979), cert. denied, 444 U.S. 1103 (1980). Whether a juror is thus "irrevocably committed," i a mixed question of law and fact for determination by the trial court.

> As fact-finder, the trial court must weigh the meaning of the answers given in light of the phrasing of the questions posed, the inflections, tone, and tenor of the dialogue, and the general demeanor of the prospective juror. We are aware that, while the words employed may, when transcribed and read in retrospect, appear ambivalent, the judge who heard them uttered was uniquely positioned to assess their ultimate import.

Smith v. Commonwealth, 219 Va. 455, 464-65, 248 S.E.2d 135, 141 (1978), cert. denied, 441 U.S. 967 (1979). The trial judge must satisfy himself that the juror's commitment against the death penalty is 'unmistakably clear.' This finding of fact cannot b disturbed on appeal unless we can say, upon consideration of the voir dire as a whole, that it was erroneous. Id. at 465, 248 S. 2d at 141.

We can neither see nor hear Mr. Tostenson. Factors beyond the printed record of his response led the trial court to conclu "it is my interpretation from his answers that he has that prob- lem.' It was apparent to the trial court that his commitment against the death penalty was "unmistakably clear," and that his ability to perform his duties, within the statutory scheme gov- erning a capital murder case was, in the words of Adams v. Texas "substantially impair[ed]." 448 U.S. at 45. We cannot say from an examination of the voir dire as a whole that this finding of fact was erroneous.

The defendant's contention that he was denied an opportuni to "rehabilitate" Mr. Tostenson, suffers from the same infirmity as his argument concerning his right to ask further voir dire questions on the subject of illegal drugs. No proffer was made to the further questions which might have been put to the pro- spective juror, and we are unable to determine from the record whether they would have been relevant, or whether their exclusio would have been an abuse of discretion. Rule 5:21.

Moreover, when voir dire examination has disclosed a juror's state of mind which warrants his exclusion for cause, further questions put to him for the purpose of "rehabilitating" him can have little effect. See Justus v. Commonwealth, 220 Va. 971, 977, 266 S.E.2d 87, 91 (1980); Breeden v. Commonwealth, 217 Va. 297, 300, 227 S.E.2d 734, 736 (1976). Unless the subsequent questions serve to dispel a clear misunderstanding or correct an inadvertent misstatement, the trial judge is left with the ambiguous task of deciding which answer is more reliable, the first or the last.

B. The Guilt Phase.

VI. Evidence of Defendant's Mental History and the Effects of Drugs.

1. Emotional problems.

The defendant offered in evidence, at the guilt phase of the trial, certain school records from his childhood and the testimony of two social workers who had counselled him from 1974 until January 1981. The purpose of the evidence was to show that the defendant had a long history of anti-social behavior, emotional problems, difficulties in controlling impulses, low self-esteem, and involvement with alcohol and drugs. In addition, expert opinions were offered from a clinical psychologist and a psychiatrist who had interviewed and administered tests to the defendant while he was in custody awaiting trial. The purpose of their testimony was to show that the defendant, although not psychotic, suffered from a "borderline personality disorder." Because the only defense offered in the case was that of voluntary intoxication, the defendant contends that this evidence was probative of his mental state at the time of the offenses, i.e., that he was in a condition which precluded premeditation and deliberation. The trial court excluded most of this evidence at the guilt stage, but permitted its introduction at the penalty stage of the trial as matter in mitigation of punishment. The defense was also permitted to make an extensive proffer of the excluded evidence out of the jury's presence at the guilt stage, and its content is a part of the record.

When, as here, no insanity defense is interposed, the

defendant's mental condition is only relevant insofar as it might be probative of a fact in issue: i.e., premeditation at the time of the killing. Neither the school records, nor the history of the defendant's past "problems" related by the social workers was competent to address this issue, and they did not purport to do so. Rather, the defendant argues, they were proper as foundation for the opinions of the experts, to which we now turn.

Dr. Reuben Horlick, a clinical psychologist, interviewed the defendant three times and administered a battery of psychological tests. He opined that the defendant had a "low to average level of general intelligence," with an I.Q. of 95. He described him as "a seriously disturbed individual" who acted "in an immature and impulsive manner." His diagnosis was "borderline personality basic disorder . . . aggravated by substance abuse and alcohol." He offered no opinion on the question whether the defendant's mental condition was such, on February 25, 1982, as to affect his ability to premeditate and deliberate.

Dr. David Lanham, a psychiatrist, interviewed the defendant three times in jail. He agreed with Dr. Horlick's diagnosis of "borderline personality disorder," and opined that the defendant would be prone to impulsive behavior. On cross-examination during the penalty phase he was asked:

> Q. [I]s there anything about this disorder which would prevent an individual from planning and thinking about committing a crime?
>
> A. I would say that impulsive behavior is much more likely. But it would not prevent, necessarily, a planning.

Neither expert expressed, nor was asked to express, an opinion as to the defendant's mental state at the time of the crime, and neither characterized his underlying condition as one which would necessarily affect his ability to premeditate. If the evidence had been admitted, the jury would have been required to speculate as to what, if any, effect it might have had upon the crucial fact in issue. In Spruill v. Commonwealth, 221 Va. 475, 479, 271 S.E.2d 419, 421 (1980), considering medical testimony as to mental state which dealt only with "possibility," we said:

> In order for such testimony to become relevant, it must be brought out of the realm of speculation and into the realm of reasonable probability; the law in this area deals in "probabilities" and not "possibilities."

The proffered evidence suffered from the same infirmity as that we rejected in Spruill, and the trial court correctly excluded it.

2. Effect of Drugs.

The defendant further sought to elicit from Dr. Lanham an expert opinion as to the effect of LSD upon a user, particularly a user suffering from a "borderline personality disorder' such as his. Here, the defendant relies upon Fitzgerald v. Commonwealth, 223 Va. 615, 629-30, 292 S.E.2d 798, 806 (1982), cert. denied, _____ U.S. _____ (1983), where an expert toxicologist, without objection, testified to the individual and cumulati effects of LSD, Tranxene, and alcohol. In response to a hypothetical question, the witness then gave a positive opinion that the ingestion of various quantities of these drugs in combination could neither cause the user to commit violent acts nor render h incapable of premeditating them. This was probative upon the issue of premeditation by reason of its certainty. It met the test of Spruill because it did not leave the jurors adrift to speculate in an area of expertise beyond their knowledge.

Here, by contrast, Dr. Lanham's opinion was expressed in the proffer as follows:

> Q. Can you testify to a reasonable degree of medical certainty that a person as I just told you, ingesting those types of drugs, could you tell me if a person could perpetrate the acts such as homicide without premeditation?
>
> A. It's entirely possible; yes.

The defendant was permitted to describe his own condition the time of the offense, to the jury. The jury also heard the testimony of Gerald Frazier, Michael Hamilton, and the defendant mother as to his appearance and demeanor that day. Frazier and Hamilton described his use of drugs, and Frazier testified as to his condition when under their influence. This factual testimon although circumstantial, was probative of the fact in issue. Th proffered expert testimony, however, raised only a "possibility.

it failed to meet the test of Spruill, and was properly excluded.

VII. Improper Question by Commonwealth's Attorney.

On direct examination, the defendant was asked:

> Q. How did you feel towards your mother after you left?
>
> A. Sorry.

On cross-examination, the Commonwealth's Attorney asked:

> Q. Did you not say that you felt sorry for your mother?
>
> A. That too; yes.
>
> . . . .
>
> Q. Did you have any hard feelings towards your mother?
>
> A. No.
>
> Q. Did you ever make the statement that you would like to have your mother done away with?

Defense counsel objected. The court immediately excused the jury for a ten-minute recess, told the Commonwealth's Attorney that the question had been "most inappropriate," and announced his intention to give a cautionary instruction. The defendant moved for a mistrial which the court denied. The court said: "I do not intend to repeat the question because I think to repeat it would be just to amplify it." The jury was then recalled and instructed by the court:

> Ladies and gentlemen of the jury, just prior to the recess, the Commonwealth was questioning or cross-examining the witness. Please disregard the last remarks that the Commonwealth Attorney made in its entirety.
>
> We will give him a chance to go back to his cross-examination at this time; but I ask you to disregard the remarks or question that was asked and remarks made.

The defendant argues that the effect of this improper question was so prejudicial that the court's admittedly prompt corrective action could not remove it. We disagree. "[E]rror arising from an improper question or improper conduct of counsel may usually be cured by prompt and decisive action of the trial court without granting a motion for a mistrial." Black v. Commonwealth, 223 Va. 277, 286, 288 S.E.2d 449, 454 (1982). The trial court must make an initial factual determination, in the light o

all the circumstances of the case, whether the defendant's rights had been so indelibly prejudiced as to require a new trial. Unless we can say as a matter of law that this determination was wrong, it will not be disturbed on appeal. Unless the record shows the contrary, it is to be presumed that the jury followed an explicit cautionary instruction promptly given. See Lewis v. Commonwealth, 211 Va. 80, 84, 175 S.E.2d 236, 239 (1970).

Here, the trial court pointed out a significant circumstance bearing upon the degree of prejudice actually suffered by the defendant. When the improper question was asked, the defendant had recently completed his direct testimony in which he had, in effect admitted beating the helpless victim to death with a fireplace poker. In comparison to that shocking story, any imputation that he might have once entertained unpleasant thoughts about his mother would pale into relative insignificance.

VIII. Second-Degree Murder as a Lesser-Included Offense.

The court instructed the jury as to the element of capital murder and of first-degree murder. The jury was also instructed, at the defendant's request:

> If you find that the defendant was so greatly intoxicated by the voluntary use of alcohol or drugs or both, that he was incapable of deliberating or premeditating, then you cannot find him guilty of capital murder.

Further instructions told the jury that if it entertained any reasonable doubt as to the grade of offense, it must resolve that doubt in the defendant's favor and find him guilty of the lesser offense; and if it reasonably doubted that he was guilty at all, it must acquit him.

The defendant objected to the court's refusal to give an instruction on second-degree murder as an additional lesser-included offense. He argues that, although he admitted committing murder with a deadly weapon, the Commonwealth was nevertheless required to prove two elements to raise it to capital murder: (1) premeditation and deliberation, and (2) killing in the commission of a robbery. He contends that if the jury should find only one of the elements to have accompanied the killing, he would be guilty of

first-degree murder, and if the jury should find neither element present, he would be guilty of second-degree murder.

In Wooden v. Commonwealth, 208 Va. 629, 634, 159 S.E.2d 623, 627 (1968), overruling an earlier decision to the contrary, we held that the trial court properly refused an instruction on second-degree murder where the evidence would support only findings of first-degree murder or not guilty. This was so notwithstanding the presumption that every homicide is second-degree murder. In Wooden, we adopted the view of the dissenting justices in Plymale v. Commonwealth, 195 Va. 582, 602, 79 S.E.2d 610, 620 (1954): "The presumption of second-degree murder yields to facts." No instruction should be given unless it is supported by evidence, and such evidence must be more than a scintilla. Hatcher v. Commonwealth, 218 Va. 811, 814, 241 S.E.2d 756, 758 (1978).

It is true that if the jury found the element of premeditation and deliberation to be lacking, by reason of voluntary intoxication, it could not convict the defendant of capital murder. But we do not agree with the defendant that, under the evidence in this case, the jury could further find the element of contemporaneous robbery lacking, so as to reduce the crime to second-degree murder.

In Haskell v. Commonwealth, 218 Va. 1033, 1043-44, 243 S.E. 2d 477, 483 (1978), we adopted the view that the felony-murder statute, Code § 18.2-32, applies where a killing is so closely related to a robbery in time, place, and causal connection as to make it a part of the same criminal enterprise. That statute makes murder, other than capital murder, in the commission of robbery, murder of the first degree. Premeditation and deliberation are not elements of felony-murder, but malice is. Malice inheres in the doing of a wrongful act intentionally or without just cause or excuse. Thus, the malice inherent in the robbery provides the malice prerequisite for a felony-murder conviction. Wooden v. Commonwealth, 222 Va. 758, 284 S.E.2d 811 (1981).

In Linwood Earl Briley v. Commonwealth, 221 Va. 532, 273 S.E. 2d 48 (1980), cert. denied, 451 U.S. 1031 (1981), we held that the relationships of time, place, and causal connection between a rob-

bery and a murder need not necessarily be jury questions. They could, in a proper case, be determined as a matter of law. Briley and his accomplices had intercepted their victim outside a restaurant, robbed him at gunpoint, and forced him to enter his own automobile, in which they abducted him for some miles to Mayo's Island in the James River. Arriving at the island fifteen to twenty minutes after the initial robbery, they shot the victim fatally. They drove away in his car, which they then stripped of parts and abandoned. We held that the killing involved there was so closely related in time, place, and causal connection to the robbery as to make it a part of the same criminal enterprise as a matter of law.

Applying these principles to the evidence before us, it is manifest that the robbery and the murder of Pamela Benner are even more inextricably connected than the crimes in Briley. The victim was, in the absence of her family, the custodian of the home and its contents. The property was stolen through the exercise of violence against her. The bloodstains on the splintered doors to the locked bedrooms in which the stolen property was kept are circumstantial evidence that her ability to protect the property had been subdued by overwhelming violence before the theft occurred. While it is impossible to ascertain the precise time of her death, in relation to the taking of the property, the Commonwealth's evidence shows that the defendant, having gone there to rob her, bound and beat her with a poker, before he went upstairs to the kitchen, leaving traces of blood and hair, to secure the ice pick and carving fork with which he then stabbed her repeatedly.

The defendant's evidence does nothing to separate the crimes as to time, place, or causal connection. Indeed, his version, if believed, makes it unmistakably clear that the robbery and the murder were a part of the same criminal enterprise. He admitted leaving the house, in possession of the stolen goods, spattered with blood. There was not a scintilla of evidence upon which the jury could have found the murder unrelated to the robbery in time, place, or causal connection. Only speculation could support such a finding. The record permits no construction except that of a

common criminal enterprise as a matter of law. Thus, the court correctly refused to instruct the jury as to second-degree murder. See Hopper v. Evans, _____ U.S. _____ (1983); Bunch v. Commonwealth, _____ Va. _____, _____ S.E.2d ___ ___ (1983).

We agree, moreover, with the Attorney General's argument that even if the refusal of a second-degree murder instruction were deemed to be error, it would, in the circumstances of this case, be harmless beyond a reasonable doubt. The jury's capital murder verdict makes clear that it rejected the defense of voluntary intoxication. Had that defense been believed, the jury would have been required, by the court's instructions, to make a first-degree, rather than a capital murder finding. Thus, even if the jury had been presented with a second-degree murder option, it could never have actually reached such a verdict in view of its finding, beyond a reasonable doubt, that the defendant acted with premeditation and deliberation.[3]

C. The Penalty Phase.

IX. Facial Constitutionality of Statutory Sentencing Procedure.

The defendant argues that Virginia's capital murder sentencing procedure is facially unconstitutional for the reasons we considered and rejected in Stamper v. Commonwealth, 220 Va. 260, 257 S.E.2d 808 (1979), cert. denied, 445 U.S. 972 (1980); Clark v. Commonwealth, 220 Va. 201, 257 S.E.2d 784 (1979), cert. denied,

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[3] In Potter v. Commonwealth, 222 Va. 606, 611, 283 S.E.2d 448, 451 (1981), and McClung v. Commonwealth, 215 Va. 654, 212 S.E.2d 290 (1975), we rejected the Commonwealth's contentions that the refusal of lesser-included offense instructions was harmless. Those decisions, unlike the present case, were based upon the fact that the jury's rejection of one defense did not necessarily indicate that it would also have rejected another defense, supported by credible evidence, which was the subject of the refused instruction. The defendant here relies on Beck v. Alabama, 447 U.S. 625 (1980). Beck is inapposite. It deals with an Alabama capital murder statute which required the jury to choose between capital murder and acquittal, excluding any lesser offense. The Supreme Court foresaw the danger that such a scheme might tempt the jury to convict a defendant of capital murder who was actually guilty of a lesser offense, rather than acquit him when he was obviously guilty of some crime. There was no such danger here. If the jury any reasonable doubt as to the defendant's guilt of capital murder but believed him guilty of a lesser offense, it would not have been forced to an acquittal, but rather could have convicted him of murder in the first degree.

2d 202, cert. denied, 441 U.S. 924 (1979); and Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), cert. denied, 441 U.S. 967 (1979). We adhere to the views expressed in those cases.

X. Conflict between Code § 19.2-264.2 and Code § 19.2-264.4(C).

The defendant pointed out to the trial court, at the penalty phase, that Code § 19.2-264.2 provides that the trier of fact shall not impose the death penalty unless it makes one of the prerequisite findings "after consideration of the past criminal record of convictions of the defendant," while Code § 19.264.4(C) provides that the death penalty shall not be imposed unless the Commonwealth proves beyond a reasonable doubt

> that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery of the victim. (emphasis added).

He argues that the dichotomy between "past criminal record of convictions" and "prior history" renders the statutory scheme unconstitutionally vague. He made a motion in limine, at the beginning of the penalty phase, to restrict the Commonwealth to proof of his 'past criminal record,' and to exclude any other references to his "prior history." This argument is based upon the alleged vagueness of the term "prior history." He says that it does "not provide the defendant with an objective standard on which to prepare for the defense of the penalty phase," while "criminal record of convictions" does.

In Smith v. Commonwealth, 219 Va. 455, 477, 248 S.E.2d 135, 148 (1978), cert. denied, 441 U.S. 967 (1979), we rejected a contention that the language of Code § 19.2-264.4(C) was unconstitutionally vague. We relied on the reasoning of Jurek v. Texas, 428 U.S. 262, reh'g denied, 429 U.S. 875 (1976). The rationale of Jurek is apposite:

> The task that a Texas jury must perform in answering the statutory question in issue

or

> [determining the probability of future criminal conduct, under a statute similar to Virginia's] is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine.

428 U.S. at 275-76 (emphasis added).

The admission of evidence, other than criminal convictions, as to the defendant's dangerousness, was expressly approved in Quintana v. Commonwealth, 224 Va. 127, 295 S.E.2d 643 (1982). We adhere to the views expressed in Smith, and reject the contention that unconstitutional vagueness affects the statutory scheme, either by reason of the terms of Code § 19.2-264.4(C), or because of the differing language of the two sections.[4]

XI. Instruction to Consider Mitigating Circumstances.

The defendant tendered five proposed jury instructions at the penalty phase dealing with the jury's duty to consider mitigating circumstances in fixing punishment. All were either defective in form or erroneous statements of the law.[5]

Instead, the jury was instructed that the death penalty could not be imposed unless the Commonwealth proved at least one of the statutory predicates ("dangerousness" or "vileness," framed in the statutory language) beyond a reasonable doubt. Even if one or both were proved, the jury was told only that it may fix the punishment at death; but if the jury believed from all the evidence

---

[4] We note that although the jury was instructed as to both the "dangerousness" and the "vileness" predicates for capital punishment, and the Commonwealth argued that both were present, the jury verdict rejected "dangerousness" and fixed punishment solely on the basis of the "vileness" predicate. Obviously, a finding of "vileness" can be based only on the circumstances of the case on trial. The defendant's "prior history" is thus irrelevant to a finding of "vileness." "Past criminal record of convictions" and "prior history" would be relevant only to the "dangerousness" predicate.

[5] Instructions "D" and "E" referred to "death by electrocution." This term is improper. The method of execution of the death penalty is a legislative concern, not within the province of the jury. Instruction "G" told the jury that it must find that a mitigating circumstance exists if there is any "substantial" evidence to support it. Instruction "H" purported to establish limits on the aggravating circumstances which the jury might consider. Instruction "I" purported to establish a balancing test for the relative weight to be given to mitigating and aggravating circumstances. There was no authority for any of these instructions.

that the death penalty was not justified, then it shall fix punishment at life imprisonment. The instruction further told the jury that if the Commonwealth failed to prove either predicate beyond a reasonable doubt, the jury must impose life imprisonment. These instructions adequately stated the statutory framework and were sufficient. See Coppola v. Commonwealth, 220 Va. at 255, 257 S.E.2d at 808.

The defendant argues that even if his offered instructions were not to be given, his constitutional right to have the jury consider all mitigating factors before deciding punishment was impaired by the trial court's refusal to give some instruction especially drawing the jury's attention to evidence in mitigation. We disagree. The defendant was given a full opportunity to adduce evidence in mitication, and in fact did so. Over one hundred pages of the trial transcript are devoted to it, and it was fully argued. The jury was instructed to consider 'all the evidence,' and the burden of proof was correctly allocated.

We have repeatedly held that an instruction is improper which singles out one portion of the evidence for special emphasis. Snyder v. Commonwealth, 220 Va. 792, 797, 263 S.E.2d 55, 58 (1980); Woods v. Commonwealth, 171 Va. 543, 547-48, 199 S.E. 465, 467 (1938). We find no error in the court's rulings on the instructions at the penalty phase.

D. Statutory Sentence Review.

Although not argued on appeal, we must determine, by statutory mandate, "1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and 2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Code § 17-110.1(C).

A careful examination of the entire record shows no evidence of "passion, prejudice or any other arbitrary factor" which might have affected the jury's determination of punishment. As we did in Fitzgerald, we have examined the records in all the capital murder cases reviewed by this Court, taking particular note of th

facts at those at which juries imposed capital punishment solely on the basis of the 'vileness' predicate. We found that the vileness of Fitzgerald's treatment of his victim exceeded that of a prior case we had reviewed until that time. We now conclude that LeVasseur's atrocious conduct toward Pamela Benner is a close competitor in sheer, unprovoked viciousness. We hold that the sentence of death is not excessive or disproportionate to sentences generally imposed by Virginia juries in crimes of a similar but less horrifying nature.

Having found no reversible error in the proceedings, and having independently determined that the sentence of death was properly imposed, we decline to disturb or commute the sentence and will affirm the judgment of the trial court.

Affirmed.

Stephenson, J., dissenting.
Cochran and Poff, JJ., join in dissent.

JOHN JOSEPH LeVASSEUR

v. Record No. 822050

COMMONWEALTH OF VIRGINIA

Stephenson, J., dissenting.

LeVasseur contends he was so intoxicated he was incapable of forming a willful, deliberate, and premeditated intent to kill the deceased, and therefore could not be guilty of capital murder. Johnson v. Commonwealth, 135 Va. 524, 115 S.E. 673 (1923). This was his only defense, and the trial court found there was evidence to support the giving of a jury instruction therefor.

Since his alleged voluntary intoxication was produced primarily by the use of illegal drugs, LeVasseur argues his counsel had the right during jury voir dire to ascertain whether a prospective juror would apply the voluntary intoxication rule even though illicit drugs were involved. I agree.

It is apparent from the record that defense counsel intended to question each prospective juror to determine whether he or she was "sensible of any bias or prejudice," Code § 8.01-356, respecting the use of illegal drugs, which would preclude that person from following the court's instruction respecting voluntary intoxication. Apparently, this line of questioning proceeded without incident until prospective juror Anna Cornwell was questioned. At that point, the Commonwealth's Attorney suggested to the court that the question defense counsel had been asking in this regard should be reframed, and the court instructed defense counsel to ask the following question: "Assuming that you are all opposed to the use of illegal drugs, would this fact, alone, prejudice you to such a degree that you could not consider their usage, if the evidence develops that they were used, as a part of the defense."

Essentially following the court's suggestion, defense counsel asked Cornwell the following question:

I would assume that . . . you are opposed

> to drugs, the use of illegal drugs. Do you have any bias or prejudice that would make you unable to consider the usage by the defendant, of illegal drugs, as part of his defense?
>
> . . . .
>
> Would you be able to -- would you be unable to consider the usage by the defendant of illegal drugs, as a part of his defense?

When Cornwell appeared not to understand the question, the court inquired: "the fact that it may develop that he had used illegal drugs, could you consider that as a part of his defense?" Cornwell responded in the negative. Thereupon, the defendant challenged Cornwell for cause. The court overruled this motion, and Cornwell was deemed qualified to serve as a juror in this case. Clearly, Cornwell did not "stand indifferent in the cause," and the defendant's challenge of her for cause should have been sustained.

When defense counsel began to question the next prospective juror, the court, sua sponte, ruled as follows:

> Mr. Zauzig [defense counsel], the other question which you have asked in the past has been rephrased. The Court has previously ruled on this question and how this should come forward. It did not come forward.
>
> What your question in the past has been getting at is, in effect, asking the jury to sanction what is an illegal act.
>
> For that reason, I'm denying you the right to ask that question as far as any further prospective jurors are concerned.

As a result of this ruling, nine jurors in this case were not examined regarding any bias or prejudice they might have had respecting the use of illegal drugs as it related to LeVasseur's intoxication defense. In my judgment, this omission prejudiced the defendant and constituted reversible error.

The majority argues that defense counsel's question was both ambiguous, because the prospective juror did not know whether drug intoxication could be considered merely in mitigation or for acquittal, and irrelevant, because it only was "calculated to elicit a prospective juror's underlying attitude toward the use of illegal drugs generally." I

consider these arguments to be hyper-technical and strained.

While defense counsel's question may not have been a model of clarity, the prospective jurors, prior to Cornwell, apparently understood and answered it to the satisfaction of both the court and counsel. It is to be remembered that the court, not counsel, asked Cornwell the question which received her negative response. In addition, the court, at the instance of the Commonwealth's Attorney, framed the question which counsel was instructed to use for the remaining prospective jurors. My reading of the record indicates that counsel, on the single occasion afforded him, substantially complied with the trial court's instruction.

There is no doubt defendant's voir dire was extremely relevant in determining whether bias or prejudice existed, as it touched upon the only defense he advanced. The trial court has the ultimate responsibility of determining whether a prospective juror "[h]as a bias or prejudice against the Commonwealth or the accused," or whether there is "any reason to believe he might not give a fair and impartial trial to the Commonwealth and the accused based solely on the law and the evidence." Rule 3A:20. "The constitutional and statutory guarantee of an impartial jury is no mere 'legal technicality,' but a substantive right scrupulously to be observed in the day-to-day administration of justice." Martin v. Commonwealth, 221 Va. 436, 445, 271 S.E.2d 123, 129 (1980). If defense counsel's question was unclear, the trial court should have clarified it, rather than forbidding further questioning.

"Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." Dennis v. United States, 339 U.S. 162, 171-72 (1950). In the present case, the defendant was not given this opportunity. Therefore, I would reverse the judgment of the trial court and remand the case for a new trial.

Cochran and Poff, JJ., join in dissent.

83-5670

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 9th day of September, 1983.

John Joseph LeVasseur, Appellant,

against Record No. 822050
Circuit Court No. 116622

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 17th day of June, 1983, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Clerk

APPENDIX B-1

VIRGINIA

IN THE CIRCUIT COURT OF THE COUNTY OF PRINCE WILLIAM

COMMONWEALTH OF VIRGINIA

#11662

VS.

FELONY - CAPITAL MURDER
(OFFENSE DATE - 2/25/82)

JOHN JOSEPH LeVASSEUR

The 5th day of November, 1982, came the Attorney for the Commonwealth and the defendant, JOHN JOSEPH LeVASSEUR, (DOB - 2/6/63), who stands convicted of a felony, to-wit: CAPITAL MURDER, appeared before the bar of the Court in the custody of the deputy sheriff. And came also Charles J. Zau III, attorney at law, retained by the defendant to represent

Thereupon, the Court Reporter was sworn.

This case came on this day for the report of the Probat Officer and sentencing of the defendant and the Court inqui the defendant if he was in agreement to go forward with the without Gary P. Coleman, co-counsel for him, being present; the defendant advised the Court he was.

And the Probation Officer of this Court, to whom this case has been previously referred for investigation, appear in open court with a written report, which report the Proba Officer presented to the Court in open court in the presenc of the defendant who was fully advised of the contents of the report and a copy of said report was also delivered to counsel for the defendant.

Thereupon, the defendant and his counsel were given th right to cross-examine the Probation Officer as to any matter contained in the said report and to present any

additional facts bearing upon the matter as they desired to present. The report of the Probation Officer is hereby filed as a part of the record in this case.

Whereupon, the Court inquired of the defendant if he was satisfied with counsel; to which the defendant advised the Court he was.

Whereupon, the Court taking into consideration all of the evidence in the case and the report of the Probation Officer, and it being demanded of the defendant if anything for himself he had or knew to say, to which he responded that he did not; and he was then asked if he knew or had any reason why judgment should not be pronounced against him according to law, and nothing being offered or alleged in delay of judgment, it is accordingly the judgment of this Court that the defendant be and he is hereby sentenced in accordance with the verdict by the jury to death, by such means as the law provides at the time of the execution of said sentence, and that the Commonwealth of Virginia do recover against the defendant its costs by it about its prosecution in this behalf expended with interest at the rate of ten percentum per annum until paid in full.

And it is further ordered that as soon as possible after the entry of this order the defendant be removed and safely conveyed according to law from the Prince William-Manassas Regional Adult Detention Center to the said penitentiary, therein to be kept, confined and treated in the manner provided by law.

The Court proceeded to advise the defendant that the

imposition of the death sentence carries the right to have the judgment of the Court reviewed on the record by the Supreme Court to consider any errors in the trial enumerated by an appeal and to consider and determine (1) Whether the sentence of death was imposed under the influence of passion prejudice and any other arbitrary factor; and (2) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The Court doth appoint Charles J. Zauzig, III and Gary P. Coleman, able and competent attorney at law, to represent the defendant in pursuing that appeal and in seeking such other appeals as in his determination are appropriate to pursue for errors of this Court.

Whereupon, the Court doth suspend execution of this sentence until such time as the Supreme Court of Virginia acts on the defendant's appeal.

The Court certifies that at all times during the trial of this case the defendant was personally present and his attorney was likewise personally present and capably repres the defendant.

And the defendant is remanded to the Prince William - Manassas Regional Adult Detention Center to await transfer to the Virginia State Penitentiary.

JUDGE

MR. ZAUZIG: Thank you, Your Honor.

(OPEN COURT)

MR. EBERT: I would ask both of you, please, if on the law and evidence of this case, as it develops, the death penalty is one of the possible sentencing alternatives, can each of you consider imposing that if the evidence and law warranted it?

(Both agreed.)

MR. EBERT: Could you actually vote for the death penalty, as one of 12 jurors, should the law and evidence warrant the same?

(Both agreed.)

MR. EBERT: They're acceptable to the Commonwealth, Your Honor.

THE COURT: All right; Mr. Zauzig.

MR. ZAUZIG: Do any of the two of you, or would either of you be unable to consider evidence of the use of illegal drugs in support of defense to the crime of murder?

(No response.)

MR. ZAUZIG: You wouldn't have any problem consider that evidence?

(Both agreed.)

MR. ZAUZIG: Thank you, Your Honor.

MR. EBERT: Could each of you, as one of 12 juror vote, if the law and evidence so justified?

(Both agreed.)

MR. EBERT: Acceptable to the Commonwealth, Your Honor.

THE COURT: All right. Mr. Zauzig.

MR. ZAUZIG: Could each of you consider the use of illegal drugs in support of a defense to the crime of murder

MS. CONNAUGHTON: I'm not sure what you mean.

THE COURT: I'll let you elaborate.

MR. ZAUZIG: If evidence is produced at trial that there were use of illegal drugs by the defendant, and the judge, at a later time, instructs you as to law that there is a defense of involuntary intoxication, to a degree where you could not form premeditation, would the fact that the evidence would be the use of illegal drugs -- would you be unable to consider that evidence in support of that defense?

MR. EBERT: I would object to the form of that question.

THE COURT: Objection sustained.

Let me see if I can't help you out a little bit.

Do either one of you feel as though the mere fact

that use of illegal drugs may be a part of the defense in this case, do either one of you feel about that in such a manner so that you could not be able to consider it merely because there were illegal drugs used; or could you not could you consider the evidence in the defense?

MS. CONNAUGHTON: I would think so, yes.

THE COURT: How about you, sir?

MR. EVERETT: Yes.

THE COURT: All right; does that answer your question?

MR. ZAUZIG: Yes, Your Honor.

THE COURT: Thank you.

We will send you back to the jury room, now, await further word from the Court.

Do not discuss the case among yourselves, nor the persons in the back there where you'll now be sent.

THE CLERK: Edward C. Tostenson, Jr.

Rudolph E. Woltner, Jr.

THE COURT: Gentlemen, if you will have a seat give me your attention, please.

You have previously heard me tell you someth about this case, and just to refresh your memory, the is that the defendant at the bar, Mr. John Joseph Leva

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to sit as jurors in this case will be given another oath. That oath will be to well and truly try and a true deliverance make between the Commonwealth and the defendant, and a true verdict give, according to the law and the evidence.

Does either one of you have any problem with maintaining the mandate of that oath, regardless of what the evidence may develop?

(No response.)

THE COURT: Mr. Ebert.

MR. EBERT: If, under the law and evidence of this case, it develops that the death penalty is one of two alternatives, would each of you consider imposing that penalty?

(Both agreed.)

MR. EBERT: Could each of you, as one of 12 jurors vote for such a penalty if the law and evidence warrants it?

(Both agreed.)

MR. EBERT: I have no further questions, Your Honor; acceptable to the Commonwealth.

THE COURT: Mr. Zauzig.

MR. ZAUZIG: Could each of you consider evidence of the use of illegal drugs by the defendant in support of a defense for the crime of murder?

MR. DEATTY: Could you state that again pleas
to see if I can understand that a little better?

MR. ZAUZIG: If the Judge instructed you that
is a defense to the charge of murder, and part of that
defense would involve evidence of the defendant's use o
illegal drugs, could you consider that evidence of illeg
drugs, just the mere fact that there are illegal drugs
involved?

(Both agreed.)

MR. ZAUZIG: All right; thank you, Your Hono

THE COURT: You now may go back to another ju
room.

I will admonish you again not to discuss it a
yourselves, or with anyone who might be back there.

Remain in the jury room until such time as yo
called for, except for your personal needs.

Next group, please. .

MR. EBERT: Your Honor, may I address the Cou
please?

THE COURT: Yes, sir.

MR. EBERT: Before we go any further, I would
to the Court that that question should be framed as fol

"Would the fact that the use of drugs is inv

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THE COURT: All right.

Considering what you have heard and your c
do you believe that you can enter the jury box with
mind and wait until the entire case is presented bef
reaching a fixed opinion or conclusion as to the gui
innocence of the accused?

MR. WOLTNER: I think so.

THE COURT: Is there any question in your
sir?

MR. WOLTNER: No; I have no question.

THE COURT: And then you would answer in t
affirmative that you can enter the jury box with an
mind and wait until the entire case is presented bef
reaching a fixed opinion or conclusion as to the gui
innocence of the accused?

MR. WOLTNER: Yes, sir.

THE COURT: And you, sir?

MR. TOSTENSON: Yes, sir.

THE COURT: Do either one of you have any
or conscientious scruples or objections against the
of the death sentence?

(Inaudible.)

THE COURT: Are you sensible of any bias

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MR. ZAUZIG: Your Honor --

THE COURT: Excuse me.

MR. WOLTNER: I've never really had to think about this particular question, but I'm not sure I fully support capital punishment.

THE COURT: Let me -- you think about that while I proceed with the next question which may be of some help to you or to us.

Are you sensible to any bias or prejudice against the Commonwealth or the accused?

(No response.)

THE COURT: Do you feel that regardless of the facts or circumstances, that in every case of murder, the death penalty should be imposed?

MR. TOSTENSON: Would you repeat that again, please?

THE COURT: Do you feel that regardless of the facts or circumstances, that in every case of murder, the death penalty should be imposed?

MR. TOSTENSON: No, sir.

THE COURT: In other words, if there is a murder, then it is automatic death penalty.

Do either of you feel that regardless of the facts or circumstances, that in every case of murder, the death

penalty should be imposed?

(Both denied.)

THE COURT: Do you feel that under all circ... every time there is a murder that the death penalty s... be imposed?

MR. WOLTNER: Well, if you're calling it a ... and not just a manslaughter or some other type of h...

THE COURT: There are degrees of murder, sir, ... the question is, do you feel that in every case of mur... in every case of murder, that the death penalty should ... imposed?

MR. WOLTNER: No.

THE COURT: The answer is no?

MR. WOLTNER: Yes.

MR. TOSTENSON: Yes.

THE COURT: If you sat as a juror in this cas... and if the jury should happen to convict the defendant o... capital murder, would you be able to consider voting fo... sentence -- for a sentence of less than death?

MR. WOLTNER: I might.

THE COURT: Let me repeat that question to yo...

If you sat as a juror in this case and if the jury happens to convict the defendant of capital murder,

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that is a definition.

Now the question is would you be able to consider voting for a sentence of less than death even if the Commonwealth proved all those facts?

MR. WOLTNER: No, I don't think so.

THE COURT: Under any circumstances, your vote would have to be for the death penalty?

MR. WOLTNER: Yes, sir.

THE COURT: I'll direct my questions from this point on, to the other gentleman alone. Would you remain seated where you are at this time, sir.

Do you, sir, know of any reason whatsoever, why you might not give a fair and impartial trial to the Commonwea and the accused, based solely on the law and the evidence?

MR. TOSTENSON: No.

THE COURT: Those who are ultimately chosen to serve as jurors, will be given another oath, and that oath will be to well and truly try and a true deliverance make between the Commonwealth and the defendant, and a true verdict give according to the law and the evidence. Would you have any problem maintaining the mandate of that oath, regardless of what that evidence might develop to be?

MR. TOSTENSON: No, sir.

THE COURT: All right: Mr. Ebert, do you ha... questions, sir, of this one gentleman at this time?

MR. EBERT: Mr. Tostenson, if under the la... the evidence of this case, as it develops, it develop... taht the death penalty is one of the alternatives ava... to you, could you consider voting for that alternative?

MR. TOSTENSON: I'm not sure.

MR. EBERT: Well, you'll have to tell us one ... or the other. I understand you're not sure, but are yo... saying that you don't know? Do you have any feeling as... whether or not you could consider that alternative?

THE COURT: May I ask him the second part of ... question?

MR. EBERT: Let me ask you the second part of the -- the next thing I was going to ask you -- could yo... actually vote, as one of 12 jurors, for the death penal... should the law and the evidence warrant the same?

MR. TOSTENSON: For the death penalty?

MR. EBERT: Yes.

MR. TOSTENSON: I don't know if I could be pu... that or not.

There is some doubt in my mind.

THE COURT: Excuse me, Mr. Ebert. I don't th...

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there is any necessity in going any further and causing this gentleman to agonize.

Mr. Zauzig, do you insist upon questions to be asked?

MR. ZAUZIG: Yes; I'd like to ask some questions, Your Honor, if I can.

THE COURT: All right; I'll permit you to ask questions.

MR. ZAUZIG: Mr. --

MR. EBERT: Your Honor, at this point, I would object.

It seems to me that from his answers, he does have at least a moral or philosophical problem with the potential of imposing the death sentence and I don't think he should be questioned further or permit the defendant --

THE COURT: Let me ask that question; excuse me, Mr. Zauzig.

Do you have a moral or philosophical problem with imposing the death penalty, regardless of how severe the facts and circumstances -- the evidence may be -- not facts and circumstances, but the evidence?

MR. TOSTENSON: Would you please repeat that question?

THE COURT: Do you have a moral or philosop... problem with imposing the death penalty, regardless of ... severe the evidence might develop to be?

MR. TOSTENSON: I suppose I would.

THE COURT: Under the circumstances, Mr. Zau... I see no reason to go any further.

MR. ZAUZIG: Your Honor, may I approach the b... please?

THE COURT: No, sir.

I'm going to discharge both of these jurors.

You are free to go at this time.

MR. ZAUZIG: Your Honor --

THE COURT: Both gentlemen, for different reas...

Thank you and you may go back through the cou...

MR. ZAUZIG: May I make a statement on the re...

THE COURT: Yes, sir; for the record.

MR. ZAUZIG: Your Honor, the mere fact that he opposed religiously or morally for the death penalty does not meet the winter-spring criteria.

All he has to do is to be able to consider fa... for the death penalty. He does not have to give -- stat... that he will give the death penalty --

THE COURT: Mr. Zauzig, the Court has ruled o...

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and it is my interpretation from his answers that he has that problem.

THE COURT: I note your exception; your exception is duly noted.

MR. MAUZIG: And also, for not being able to rehabilitate; we object to that also, Your Honor.

THE COURT: All right; the next group.

THE CLERK: Gerritt Beatty and Delores A. Billings.

THE COURT: Lady and gentleman, as you have previously been told, the case here to be tried to-day is one in which the defendant, John Joseph Levasseur, is charged with unlawfully, feloniously, willfully and deliberately and premeditatedly killing and murdering one Pamela Benner, in the commission of a robbery, while he was armed with a deadly weapon.

The incidence is alleged to have taken place on February the 25th, 1982, in the Woodbridge area of Prince William County.

We know that there has been some degree of media coverage in this matter.

Have either of you acquired any information about the alleged capital murder and the accused from the news media or from any other source?

83-5670

IN THE SUPREME COURT

OF THE

UNITED STATES

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SUPREME COURT, U.S.

JOHN JOSEPH LEVASSEUR,

Petitioner

v.

COMMONWEALTH OF VIRGINIA

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

The petitioner, JOHN JOSEPH LEVASSEUR, asks leave to file the attached petition for writ of certiorale without prepayment of costs and to proceed in forma pauperis. Petitioner has previously been granted leave to so proceed in the Virginia Supreme Court. Petitioner's affidavit in support of this motion is attached hereto.

JOHN JOSEPH LEVASSEUR

Charles J. Zauzig III
Attorney for Petitioner
Coleman & Zauzig
1954 Opitz Boulevard
Woodbridge, VA 22191
703-494-5173

83-5670

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v.

COMMONWEALTH OF VIRGINIA

AFFIDAVIT

I, JOHN JOSEPH LEVASSEUR, being first duly sworn according to law, depose and say that I am the petitioner in the above-entitle case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said case or give security therefore; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this case are true.

1. Are you presently employed?

No. I have been incarcerated since February of 1982.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other source? No.

3. Do you own any cash or checking or savings account? No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I have a wife, Diane LeVasseur and one child, Alexander LeVasseur; however, they do not receive support from me as I have no income.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

JOHN JOSEPH LEVASSEUR

Subscribed and sworn to before me this 7th day of October 1983.

Notary Public

My Commission Expires